Supreme Court, U.S.
FILED
APR 16 1997
CLERK

(3)

No. 96-1009

In The
Supreme Court of the United States
October Term, 1996

DAVID GOODHART and HARVEY SHENBERG,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE COURT SHOULD RESOLVE THE SPLIT IN THE CIRCUITS CONCERNING THE DEGREE OF UNANIMITY REQUIRED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT AND THE JURY TRIAL CLAUSE OF THE SIXTH AMENDMENT IN COMPOUND-COMPLEX CRIMES, SUCH AS RICO CONSPIRACY?

II.

WHETHER THE COURT SHOULD RESOLVE THE SPLIT IN THE CIRCUITS CONCERNING THE FUNDAMENTAL NATURE OF THE "AGREEMENT" PROHIBITED BY RICO CONSPIRACY BY REQUIRING PROOF THAT EACH CONSPIRATOR AGREE TO PERSONALLY COMMIT AT LEAST TWO RACKETEERING ACTS?

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REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING JURY UNANIMITY AND VERDICT SPECIFICITY IN COMPOUND-COMPLEX CRIMES.

Petitioner seeks Supreme Court review, in part, to determine the degree of juror unanamity required in non-common law, complex, "umbrella" crimes, such as RICO conspiracy -- a question left unresolved by this Court in *Schad v. Arizona*, 501 U.S. 624, 650, 111 S.Ct. 2491, 2506 115 L.Ed.2d 555 (1991) (Scalia, J., concurring). In support of his argument for a unanimity requirement, Petitioner relied heavily upon cases interpreting the Continuing Criminal Enterprise statute, 21 U.S.C. § 848, another "umbrella" crime. *See generally United States v. Edmonds*, 52 F.3d 1236 (3d Cir. 1995), *aff'd* 80 F.3d 810 (3d Cir. 1996) (en banc) (error to deny a unanimous verdict instruction as to the predicate crimes which constituted the CCE "series" of violations), *cert. denied*, 1996 U.S. LEXIS 65143 (U.S. 1996).

In its Brief, the United States takes a position that underscores why the Petition should be granted. The United States argues that RICO conspiracy criminalizes an agreement "to violate a substantive RICO provision," it does not require the government to plead or prove that an alleged RICO conspirator "agree[d] that any two particular acts would be committed." Brief of the United States, at p. 9. The position of the United States herein conflicts with the definition of RICO conspiracy adopted in every federal circuit -- including

both sides of the split this Court has granted certiorari to resolve in *Salinas v. United States, cert. granted*, No. 96-738 (Feb. 24, 1997). Indeed, it even conflicts with the position the United States took before this Court in its Brief opposing the granting of certiorari in *Salinas*. *See* Brief for the United States In Opposition, *Salinas v. United States*, No. 96-738 (January 1997), at p. 13 ("[a] RICO conspiracy offense therefore occurs if there is an agreement among the conspirators to conduct the affairs of an enterprise through a pattern of racketeering activity, *which includes an agreement that the conspirators, as a group, will commit two or more racketeeering acts*") (emphasis added).

Saying that RICO conspiracy is merely an agreement "to violate a substantive RICO provision" does little to define the nature of the unlawful agreement, because the substantive RICO provision is no ordinary crime. In conspiracy to commit common law crimes, such as robbery, theft, rape or murder, defining the "agreement" is simple; the defendant agrees to rob, steal, rape or murder someone. RICO, however, is not a crime in the ordinary sense; rather, it is a way of committing other crimes -- by conducting an "enterprise" through a "pattern" of "racketeering activity". Therefore, an agreement to violate the substantive RICO provision encompasses two subsidiary agreements -- (1) an agreement to conduct or participate in the affairs of an enterprise and (2) an agreement to the commission of at least two predicate acts. *United States v. Neapolitan*, 791 F.2d 489, 499 (7th Cir.), *cert. denied*, 479 U.S. 939, 107 S.Ct.

422, 93 L.Ed.2d 372 (1986). Both types of agreements must be proved:

> Thus, a defendant who did not agree to the commission of crimes constituting a pattern of racketeering activity is not in violation of section 1962(d), even though he is somehow affiliated with a RICO enterprise, and neither is the defendant who agrees to the commission of two criminal acts but does not consent to the involvement of an enterprise. *If either aspect of the agreement is lacking then there is insufficient evidence that the defendant embraced the objective of the alleged conspiracy.*

Neapolitan, 791 F.2d at 499 (emphasis added; footnote omitted). *Accord United States v. Carter*, 721 F.2d 1514, 1528-31 (11th Cir.), *cert. denied*, 469 U.S. 819 (1984). *See also United States v. Bright*, 630 F.2d 804, 834 (5th Cir. 1980) (there "must be proof that the individual, by his words or actions, objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise, *through the commission of two or more predicate crimes*") (emphasis added).

The need for an agreement to commit racketeering acts is particularly important in RICO prosecutions, such as the instant one, where the racketeering "enterprise" is an entirely legitimate entity -- here, the Eleventh Judicial Circuit of Dade County, Florida. An agreement merely to conduct or participate in the affairs of a court system is not illegal. Indeed, it is constitutionally protected under the First Amendment. The only *illegal* aspect of an agreement to violate the substantive

RICO provision involving a legitimate "enterprise" is the agreement to conduct the "enterprise" through the commission of specific criminal acts. The government's contention herein that no such requirement is necessary not only contradicts its position in *Salinas* but would make nonsense of the statute.

Because RICO conspiracy requires the government to prove that each alleged conspirator agreed to the commission of at least two racketeering acts, a defendant charged with RICO conspiracy is entitled to a unanimous verdict as to which two such acts he allegedly agreed to commit where, as here, the indictment relies on multiple predicate acts and "sub" predicate acts. Contrary to the government, requiring unanimity concerning the racketeering acts agreed to is not tantamount to requiring jurors to "reach agreement on the preliminary factual issues which underlie the verdict." Brief of the United States, at pp. 9-10, quoting *Shad*, 501 U.S. at 631-32 (plurality opinion). The racketeering acts are distinct crimes which form the fundamental building blocks of all RICO prosecutions. As this Court recognized in *Shad*, "nothing in our history suggests that the Due Process Clause would permit [the government] to convict anyone under a charge of 'Crime' so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction." *Shad*, 501 U.S. at 633, 111 S.Ct. at 2497. RICO, as defined by the government herein, would do just that.

The government also contends that even if the Petitioners are correct about the requirements of RICO conspiracy,

their Petition should be denied because they allegedly received a proper unanimous verdict instruction. Brief of the United States, at pp. 10-11. That simply is not true. While the district court required the jury to unanimously agree on the "racketeering acts," the "racketeering acts" in this case were *not* defined in terms of statutory violations (as required by the definition of "racketeering activity" contained in 18 U.S.C. § 1961(1)).[1] Rather, the "racketeering acts" were simply shorthand labels for the events involved in the alleged criminal conduct. In their Petition, Petitioners pointed to Racketeering Act No. 10 as an example. That "racketeering act" was pleaded merely as the "Act of Racketeering Involving Receipt of $150,000 Payment To Influence the 'Boni Carrillo Case.'" (R1-1-40.) The "generic" combination of crimes from which the jury was ultimately asked to choose was set forth *only* in terms of the "sub" predicate acts. For unanimity principles to have any meaning, the jury had to be unanimous as to which of these "sub" acts each conspirator allegedly agreed to commit.

Finally, the United States contends that it was "unlikely" that the jury would have been misled by the instructions which

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[1] Section 1961(1) defines "racketeering activity," in pertinent part, as either "(A) any act or threat involving murder ... bribery ... which is chargeable under State law" or "(B) any act which is indictable under any of the following provisions of Title 18, United States Code: ... section 1951 (relating to interference with commerce, robbery, or extortion)...."

failed to require unanimity as to the "sub" acts for RICO conspiracy, because the jury *was* required to be unanimous as to the "sub" acts for the *substantive* RICO charge. Brief for the United States, at p. 11. The United States argues that this Court should assume that the jury "cross-reference[d]" to the substantive RICO charge in convicting Petitioners of RICO conspiracy. *Id.*

If the jury utilized the substantive RICO charge in deliberating on the RICO conspiracy count, then why was the unable to reach a verdict on the substantive charge but convicted Petitioners *only* of RICO conspiracy? The United States has no logical explanation for the jury's inconsistent verdict. In any event, this Court must reject the United States' invitation to speculate about the jury's deliberative processes. The Court must assume that the jury strictly followed the instructions as given to them:

> A critial assumption underlying [the] system [of trial by jury] is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed.

Parker v. Randoloph, 442 U.S. 62, 73, 99 S.Ct. 2132, 2139, 60 L.Ed.2d 713 (1979) (plurality opinion). *See also Jackson v. Denno*, 378 U.S. 368, 382 n. 10, 84 S.Ct. 1774, 1783 n. 10, 12 L.Ed.2d 908 (1964); *Opper v. United States*, 348 U.S. 84, 95, 75 S.Ct. 158, 165, 99 L.Ed. 101 (1954).

The jury in this case was not required to be unanimous with respect to the "sub" acts for RICO conspiracy. Since the jury convicted Petitioners *only* of RICO conspiracy, the only logical construction of the verdict suggests that the jury could not reach a verdict on the substantive RICO charge (where it *was* required to be unanimous as to the "sub" acts) but convicted of RICO conspiracy where, due to the absence of the requested instruction, it was allowed to reach a patchwork, non-unanimous verdict.

II. THE COURT SHOULD GRANT THE PETITION AND CONSOLIDATE IT WITH SALINAS FOR ARGUMENT NEXT TERM

The United States agrees that Petitioners have raised the same issue now pending before the Court in *Salinas v. United States*, *cert. granted*, No. 96-738 (Feb. 24, 1997). However, the United States urges the Court to hold Petitioners' case in abeyance pending the outcome of *Salinas*, rather than consolidating it with *Salinas*. We respectfully submit that consolidation is appropriate under the circumstances.

In *Salinas*, this Court agreed to resolve a split in the Circuits concerning the proper definition of RICO conspiracy -- *i.e.*, whether the conspiratorial "agreement" requires proof that each alleged conspirator agreed to personally engage in a pattern of racketeering, *see, e.g., United States v. Ruggiero*, 726 F.2d 913, 921 (2d Cir.), *cert. denied*, 469 U.S. 831, 105 S.Ct. 118, 83 L.Ed.2d 60 (1984); *United States v. Sanders*, 929 F.2d 1466,

1473 (10th Cir. 1991); *United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011, 103 S.Ct. 1249, 75 L.Ed.2d 479 (1983). or whether the government need show that each conspirator agreed only that others would commit the racketeering acts. *See, e.g., United States v. Marmolejo*, 89 F.3d 1185, 1196 (5th Cir. 1996) (collecting cases).

The instant case, however, presents a better case than *Salinas* through which to resolve this conflict. In *Salinas*, Petitioner Salinas was convicted of RICO conspiracy *and* two counts of bribery in violation of 18 U.S.C. § 666(a)(1)(b). *See United States v. Marmolejo*, 89 F.3d 1185, 1188 (5th Cir. 1996). The *Salinas* jury, therefore, had to find that Salinas, in fact, did personally commit two racketeering acts, *i.e.*, the acts corresponding to the bribery counts. *See United States v. Pepe*, 747 F.2d 632, 667-68 (11th Cir. 1984) (where jury convicted defendants of two substantive crimes which were also listed as predicate acts in RICO charge, guilty verdicts on those crimes "operated like special verdicts; by finding guilt on those counts the jury also found that two predicate acts listed in count two had been shown"). Viewing the verdict as a whole, this Court could avoid reaching the merits of the Circuit split due to the bribery convictions.

No such problem is presented in the instant case, because neither Goodhart nor Shenberg was separately convicted of at least two crimes which paralleled the racketeering acts. Goodhart was convicted only of RICO conspiracy; Shenberg was convicted only of RICO conspiracy

and a single act of extortion. Therefore, the Court could not avoid reaching the merits of the Circuit split in the instant case by reference to other counts of conviction.

The United States seeks to avoid consolidation by erroneously arguing that Petitioners failed to raise the *Salinas* issue in the their direct appeal to the Eleventh Circuit. Brief for the United States, at pp. 13-14. Contrary to the United States, Argument Section I of Petitioners' Brief in the Eleventh Circuit raised the *Salinas* issue. In that Section, Petitioners argued that they were entitled to a unanimous jury instruction which, among other things, would have required the jury to unanimously agree "that [each] Defendant *agreed to commit* at least one" of the "sub" racketeering acts. (R18-895-3; emphasis added.) Petitioners attached as Appendix 3 to their Eleventh Circuit brief a copy of this requested instruction; a copy is attached hereto as Appendix 1.[2]

Moreover, as the government acknowledges, the Eleventh Circuit reached the merits of the *Salinas* issue anyway. *Id.* at p. 14. Therefore, this Court could do likewise, even if the

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[2] Prior to requesting this instruction in response to a question from the jury, Petitioners had requested a lengthier instruction which would have required the jury to be unanimous as to whether they believed the Petitioners *either* personally agreed to commit specific crimes *or* whether they merely agreed that these crimes would be committed by others. (R16-726-2.) However, the final instruction requested by Petitioners, and the one at issue in Petitioners' Eleventh Circuit appeal, was the final one discussed in the text.

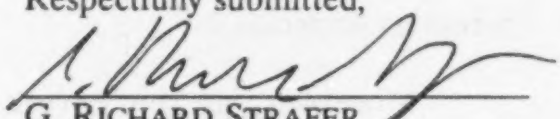
government was correct about the Eleventh Circuit record. *See United States v. Wells*, 117 S.Ct. 921, 925-26 (1997).

Consolidation of the instant case is also appropriate, because the instant case includes the unanimous verdict issue discussed in Section I *supra*. Since that issue is inextricably intertwinced with the merits, this case presents the best case within which to decide these complex but important issues.

CONCLUSION

For all of the foregoing reasons, as well as those set forth in Petitioners initial Petition, the Petitioners respectfully request that their Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,



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APPENDIX 1

PETITIONERS' SECOND REQUESTED JURY INSTRUCTION ON RICO CONSPIRACY (R18-895-3)

You are further instructed, however, that you must unanimously agree as to which two or more racketeering acts, if any, the Defendant allegedly agreed to commit. It would not be sufficient if some of the jurors should find that the Defendant agreed to commit two of the racketeering acts while the remaining jurors found that he agreed to commit two different racketeering acts; you must all agree upon the same two racketeering acts in order to find the Defendant guilty of Count 1.

Similarly, as to each racketeering act itself, you must unanimously agree as to how, if at all, the Defendant agreed that each act was committed. This is so because each racketeering act is made up of more than one distinct crimes, listed as sub-racketeering acts. It is not necessary that you find that the Defendant agreed to commit all of the crimes listed in the racketeering acts. However, it is necessary that the government prove beyond a reasonable doubt that the Defendant agreed to commit at least one of them. In addition, you must

unanimously agree as to which crime or crimes listed as sub-racketeering acts the Defendant agreed to commit, if any. That is, you cannot find that the Defendant agreed to commit a particular racketeering act if some of you think that he agreed to commit that act by agreeing to commit only crime (a) and the rest of you think that he is agreed to commit only crime (b). There must be at least one crime within each racketeering act that all of you believe the Defendant agreed to commit in order for you to find that the Defendant agreed to commit that racketeering act.